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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TRIBUNE COMPANY, ROCKWELL GRAPHIC SYSTEMS, INC., ROCKWELL INTERNATIONAL CORPORATION; ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.; RYCO GRAPHIC MANUFACTURING, INC.; SIGNODE CORPORATION; and CENTRAL DATA CORPORATION,

Appellants,

vs.

J. THOMAS JOHNSON, individually and as Director, Illinois Department of Revenue; and JERRY CONSENTINO, individually and as State Treasurer of Illinois; and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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QUESTION PRESENTED

Will a review of the opinion and judgment of the Illinois Supreme Court present a reexamination of the facts rather than a substantial federal question?

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A REVIEW OF THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT WILL PRESENT A REEXAMINATION OF THE FACTS RATHER THAN A SUBSTANTIAL FEDERAL QUESTION.

It is well established that the United States Supreme Court will exercise its jurisdiction to review substantial federal questions, and will not review a judgment of a

state court merely on questions of fact. *Grayson v. Harris*, 267 U.S. 352 (1925); *Portland R. Co. v. Railroad Commission*, 229 U.S. 397 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952). The only questions presented by the denial of the machinery and equipment exemption from use tax to Tribune are factual in nature and cannot be characterized as substantial federal questions.

A.

The Basis For The Denial Of The Use Tax Exemption

The Illinois Use Tax Act imposes a tax "upon the privilege of using in this state tangible personal property . . . ." Ill.Rev.Stat., 1979, Ch. 120, ¶439.3. It is conceded by Tribune that the purchase and use of printing presses and other equipment in its business of publishing newspapers constitutes the use of tangible personal property in this State, and as such is taxable. Tribune argues, however, that no use tax is due on its purchase and use of machinery and equipment used to make its newspaper because it is exempt from use tax by the terms of the machinery and equipment exemption contained in the Use Tax Act.

The machinery and equipment Use Tax Exemption under consideration provides that,

> The tax imposed by this Act does not apply to the use of machinery and equipment primarily in the process of manufacturing or assembling of tangible personal property for wholesale or retail sales, or lease . . . . Ill.Rev.Stat., 1981, Ch. 120, ¶439.3.

The exemption goes on to provide that,

> For the purposes of this exemption, each of these terms shall have the following meanings: (1) "manufacturing process" shall mean the production of any

> article of tangible personal property . . . by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. Ill.Rev.Stat., 1981, Ch. 120, ¶439.3.

The literal import of the foregoing Use Tax Exemption is that machinery and equipment must be employed in a manufacturing process that results in the production of tangible personal property for sale or lease in order to qualify for exemption from taxation.

Both the Retailers' Occupation Tax Act, Ill.Rev.Stat., Ch. 120, ¶440 and the Use Tax Act, Ch. 120, ¶439.2 indicate that newspapers produced by printing presses do not constitute tangible personal property for sale or lease in the following language:

> The purchase, employment and transfer of such tangible personal property as newsprint and ink for the purpose of conveying news (with or without other information) is not a purchase, use, or sale of tangible personal property.

The Tribune uses the machinery and equipment for which it seeks exemption from use tax to transform newsprint and ink into newspapers for the purpose of conveying news. Wayne Perry, the Tribune's Vice President and Director of Production, testified that Tribune's business consists of selling newspapers and that newspapers contain information. Similarly, Thomas O'Donnell, the Tribune's General Manager, testified that Tribune is in the business of gathering and disseminating the news in the form of a newspaper. Clearly then, Tribune is a business which "employs" and "transfers" to its readers "newsprint and ink for the primary purpose of conveying the news." When it does so the newspaper produced which

conveys the news is not "tangible personal property" according to the literal import of the definitional exclusions contained in paragraph 439.2 of the Use Tax Act and paragraph 440 of the Retailers' Occupation Tax Act. Because the newspaper produced is not "tangible personal property" the machinery and equipment used to produce it does not qualify for the machinery and equipment exemption contained in the Use Tax Act. The fact that Tribune does not qualify for the machinery and equipment exemption presents neither equal protection nor freedom of the press problems.

B.

Equal Protection

The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity to reference to composition, use or value.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-27 (1959).

Tribune argues that its failure to qualify for the machinery and equipment exemption results in a denial of equal protection of the law because publishers of newspapers are the sole class of manufacturers which are excluded from the benefit of the use tax exemption. Tribune's equal protection argument is without merit.

First, Tribune does not qualify for the machinery and equipment use tax exemption because it fails to bring itself within the literal terms of the exemption. The exemption by its literal terms is afforded to a class of manufacturers which use machinery to produce tangible personal property. Tangible personal property when sold by this class of manufacturers is subject to retailers' occupation tax. The Illinois legislature by excluding newspapers from the definition of tangible personal property effectively exempted publishers from the payment of retailers' occupation taxes on the sale of newspapers because the retailers' occupation tax operates on the sale of tangible personal property and a newspaper is not tangible personal property by statutory definition. Since Tribune does not produce tangible personal property which is sold subject to retailers' occupation tax it does not fit within the class which is afforded the use tax exemption.

No equal protection problem arises when one class of business such as Tribune is treated differently than another dissimilar class of business.

> The test of equal protection of the laws is whether the legislation in question operates equally on all persons in the class to which it applies and not whether the class is treated the same as another class.
>
> *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill.2d 323, 330, 265 N.E.2d 640 (1970).

Since the use tax exemption for machinery and equipment "operates equally on all persons in the class to which it

applies", i.e. manufacturers who produce tangible personal property subject to retailers' occupation tax, it is of no consequence that it does not apply to Tribune because Tribune is not within that class.

Although there is no equal protection problem incurred because the use tax exemption does not apply to Tribune's business of publishing newspapers, there would be serious equal protection problems created by affording Tribune the benefit of the use tax exemption.

If this court holds that equal protection is offended because Tribune does not qualify for the use tax exemption for machinery and equipment it uses to produce newspapers, then Tribune will be the only business afforded the exemption which does not produce tangible personal property subject to the retailers' occupation tax. Clearly, all members of the class who qualify for the exemption are required to produce tangible personal property which is sold subject to retailers' occupation tax. These class members will be discriminated against if they have to satisfy this requirement of producing tangible personal property subject to retailers' occupation tax and Tribune does not. More importantly, however, Tribune will be afforded special favorable tax treatment over all other purchasers of machinery and equipment who do not produce tangible personal property subject to retailers' occupation tax with their machinery and equipment. Tribune will be entitled to exemption from use tax for its machinery and equipment, but the others will not.

For example, the provision which was added to both the Retailers' Occupation Tax Act and the Use Tax Act in 1961 which states that "newsprint and ink for the primary purpose of conveying news . . . shall not be deemed to be a purchase, use or sale of tangible personal property" was passed by the Illinois legislature to eliminate

an inequity which existed between the electronic media and the print media. The preamble to that piece of legislation indicates that it was passed because "the General Assembly desires to prevent discrimination against newspapers and in favor of competing news-conveying agencies that do not transfer tangible personal property . . ." *Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E.2d 374, 376 (1964). The preamble goes on to say in essence that both the newspaper publishers and the electronic media are in the business of conveying the news. Newspaper publishers, however, use newsprint and ink—tangible matter—to convey the news while the electronic media convey the news without the use of any tangible matter. Because the newspaper publishers use tangible matter to convey the news, the legislature was aware of the fact that their medium of conveying news, i.e. newspapers, would be subject to retailers' occupation tax while the medium employed by the electronic media, i.e. radio and television, would not. The "newsprint and ink" language was passed, therefore, to ensure that there would be no discrimination in favor of electronic media and against newspapers by eliminating the possibility that any retailers' occupation tax would be charged on the sale of newspapers simply because newspapers have tangible characteristics. The "newsprint and ink" language ensures that both the electronic media and newspapers will be treated the same for retailers' occupation tax purposes—neither will pay taxes—because they are in the same class of business.

If, however, this Court accepts Tribune's argument that it is entitled to exemption from use tax for its machinery and equipment, it will have a use tax advantage that its counterparts in the electronic media do not enjoy. The electronic media does not transfer tangible matter with the news it conveys. The news from radio and television

goes out over the airwaves which are intangible in character. Thus, the machinery and equipment used by the electronic media to convey the news, i.e. cameras, sound equipment, etc., will not qualify for exemption from use tax because they do not produce tangible personal property subject to retailers' occupation tax. Thus, even though both Tribune and the other electronic media are in the business of conveying the news without the use of tangible matter—in Tribune's case through the statutory exclusion for "newsprint and ink"—only Tribune will qualify for an exemption from use tax for its machinery and equipment employed to convey the news. The "newsprint and ink" exclusion was passed by the Illinois legislature to eliminate this kind of discrimination.

Thus, there will be equal protection problems presented by this case only if this Court determines that Tribune qualifies for the machinery and equipment exemption because Tribune will be treated more favorably than any other member of the news conveying class to which it belongs.

C.

Freedom Of The Press

Tribune also argues, citing *Grossjean v. American Press Co.*, 297 U.S. 233 (1936), that a tax which rests solely upon the business of publishing newspapers violates the first amendment's guarantee of freedom of the press. While the appellees agree with the statement of the general principle there is no special tax imposed upon the publishers of newspapers in this case. Rather, there is a statute of general application which creates an exemption from use tax for machinery and equipment used to produce tangible personal property subject to retailers'

occupation tax. The fact that Tribune fails to come within the literal ambit of the use tax exemption does not create any first amendment difficulties.

In regard to its first amendment argument, Tribune places primary reliance upon the United States Supreme Court's opinion in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In that case Minnesota imposed a special use tax on paper and ink which would apply only to publications protected by the first amendment. The Illinois Appellate Court in rejecting Tribune's first amendment argument correctly noted:

> That case [*Minneapolis Star & Tribune Co.*] is inapposite to the instant case, however, because Minnesota "has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. [citation omitted]. The statute at issue in the case *sub judice* is a general statute which applies to all enterprises.
>
> * * *
>
> In summary, the exemption for manufacturing of tangible personal property does not apply to plaintiff because, as a matter of law, its operations do not produce tangible property. This holding does not conflict with the proscriptions of the First Amendment.
>
> *Chicago Tribune Co. v. Johnson*, 119 Ill.App.3d 270, 456 N.E.2d 356 (1984).

The Illinois Appellate Court's reasons for rejecting Tribune's first amendment argument are equally applicable here. Tribune's right to freedom of the press is not infringed by its denial of an exemption from use tax for machinery and equipment used to produce newspapers because the statutory exemption from use tax is general in its application to all enterprises which fall within its

ambit. The fact that Tribune fails to meet the terms of the statutory exemption from use tax does not result in a denial of Tribune's right to freedom of the press.

CONCLUSION

For the foregoing reasons the appellees respectfully urge this Honorable Court to dismiss the cause or to affirm the opinion and judgment of the Illinois Supreme Court, holding that Tribune is not entitled to use tax exemption for machinery and equipment used to produce newspapers.

Respectfully submitted,

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